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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 200

BLUE CAB COMPANY AND VILLAGE CAB COMPANY,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 11–18) is reported at 373 F. 2d 661. The Board's Decision and Order (J.A. 284–329)[1] are reported at 156 NLRB 489.

JURISDICTION

The decision of the court of appeals was issued on February 7, 1967 (Pet. 11). A petition for rehearing was denied on March 2, 1967, and the decree was entered the next day (Pet. 19, 20). The petition for a writ of certiorari was filed on May 26, 1967. The juris-

[1] "J.A." refers to the Joint Appendix in the court below.

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The National Labor Relations Board found that a taxicab company violated its bargaining obligation under the National Labor Relations Act by terminating the labor agreement which it had with the drivers' union without giving the notices to the federal and state mediation services required by Section 8(d) of the Act, and adopting a new lease arrangement without bargaining with the union. The following questions are presented:

1. Whether the Board, as a remedy for these unfair labor practices, properly ordered the company to cancel the lease arrangement and to reinstate, and continue to operate under, the former labor agreement until such time as it may be terminated by either party in accordance with Section 8(d).

2. Whether, where the drivers are paid a percentage of the fares they collect, the amount of such fares is a mandatory subject of collective bargaining.

3. Whether substantial evidence supports the Board's finding that the taxicab company discriminated against its drivers, in violation of the Act, by offering them employment under lease arrangements provided they renounced representation by the union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 21-22 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. THE INITIAL REFUSAL TO BARGAIN

Petitioners ("the Companies") are a single integrated enterprise engaged in the operation of taxicabs in the Village of Oak Park and other suburbs of Chicago (J.A. 284–285; 20–21, 41–42, 247–250). The Companies have had a succession of substantially identical collective bargaining agreements with the Union[2] for about 11 years (J.A. 290, 297; 128). In January 1963, the Companies wrote the Union that they wished to terminate the current agreements on June 30, 1963, when the contracts were subject to amendment or termination (J.A. 290–291, 297–298; 29, 105–106, 260, 261). On April 23, the Union wrote the Companies that it wanted to change the agreements and asked the Companies to meet for negotiations. On April 29, the Companies replied that they intended to terminate the agreements on June 30 (J.A. 298; 106, 262–263, 268). The Companies never notified the Federal Mediation and Conciliation Service or the Department of Labor of the State of Illinois of their intention to terminate, as Section 8(d) of the Act requires (J.A. 304; 30, 108, 119–121, 243–244).[3]

About the middle of May, Union Business Agent

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[2] General Teamsters, Chauffeurs and Helpers Local Union No. 782, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[3] The Department is the Illinois agency "established to mediate and conciliate disputes" within the meaning of Section 8(d)(3) of the Act. J.A. 305, n. 12; see also *Local 156, United Packinghouse Workers, et al.*, 117 NLRB 670, 672, 679.

Baggott repeated the request for a meeting to discuss contract terms. Charles Ugaste, the Companies' principal officer and the person who handled their labor relations, stated that he was not bargaining because he intended to start a cab-leasing business and would have no employees after June 30. Ugaste rejected Baggott's offer to look at agreements between the Union and other cab companies that operated with driver-lessees, adding that "after July there would be no union employees." (J.A. 298, 326; 31–32, 36, 106–107, 134).

On May 27, the Union wrote the Federal Mediation and Conciliation Service that it had an unresolved dispute with the Companies (J.A. 299; 108, 276–277). When a commissioner of the Federal Service called the parties to a meeting in his office on June 24, the Companies refused to participate in any negotiations on the ground that they were not engaged in interstate commerce. After the meeting was recessed to another location, the Companies' attorney told the Union representatives that there was no reason for the Companies to be present, because they would have no employees after July 1, 1963 (J.A. 299, 305; 74–78, 122–123).

At a meeting between Ugaste and Baggott held late in June, Ugaste proposed that in any new contract the commission of the drivers be reduced from the then 47.5 percent of the fares collected to 42.5 percent, and that the drivers be required to furnish a $100 accident bond. At the same time, Ugaste announced that the Companies planned to reduce their fares from 40 to

30 cents per mile. (J.A. 300; 51, 124, 133.) When Baggott pointed out that these measures would reduce the drivers' earnings by 30 percent, Ugaste replied: "I don't know why I made this offer. I don't want the Union or any part of it and would never sign a contract with the Union" (J.A. 301; 124, 230).

On June 28, the Oak Park Chief of Police arranged for a meeting between Ugaste and several union drivers. Ugaste offered them on "a take it or leave it basis" a commission rate of 42.5 per cent, coupled with a $100 accident bond to be furnished by the employees. When the drivers asked for a smaller reduction in the rate and the elimination of the bond, Ugaste refused and stated: "As of midnight Sunday no more cab company. You fellows are no more union. I'm not having any more union contract. You are no more employees as of Sunday midnight. If you want to work come with me working on a leasing basis, 50–50, that's it." (J.A. 301, 326–327; 96–99, 101, 125.)

On July 1, Ugaste gave Baggott a written proposal providing for a reduction in the commission rate from 47.5 to 42.5 percent, and for the $100 accident bond (J.A. 301–302; 125–126, 236, 278). The members of the Union voted to reject the offer, and they started picketing the Companies' premises (J.A. 302; 132).

2. THE DISCHARGE OF THE DRIVERS AND THE CONTINUED REFUSAL TO DEAL WITH THE UNION

Beginning July 1, the Companies started to operate under an "Independent Contractor Lease Rental Agreement." All drivers on the payrolls on July 1 were given an opportunity to sign leases for their

cabs; those who did not were offered no further employment. (J.A. 291–292.) Under the lease agreement, the driver received 50 percent of the gross fares and was required to purchase his own gasoline. He received none of the benefits provided in the prior labor agreements with the Union, such as vacations and contributions to the Union's health and welfare fund. (J.A. 292, 325–326; 33–35, 251–257, 264–267.) In conjunction with adopting the lease arrangement, the Companies, as of July 1, reduced the fare per mile from 40 to 30 cents (J.A. 294).

When negotiations between the Union and the Companies were resumed on July 24, the Companies' attorney stated that he was present only to negotiate about the Companies' going out of business, which had occurred on July 1. He admitted, however, that the Companies were advertising for drivers on a lease basis. (J.A. 302–303; 79–80, 85, 127). When the Union offered to have all drivers return to work, the Companies' attorney replied that the Companies were not employing any drivers (J.A. 303, 81–82). In September 1963, the Union again offered to have all drivers return to work. The Companies' attorney replied that the drivers' employment had been terminated as of June 30, 1963, and that any of "our former employees * * * who qualify may lease cars from us as independent contractors" (J.A. 304; 127, 279–280).

3. THE INTERFERENCE, RESTRAINT AND COERCION

Beginning on June 27, Ugaste told several drivers that there would be no union contract at any time, and that there "never would be another union in

here" (J.A. 313–314; 55, 64, 102–103, 227). Other supervisory employees similarly told individual drivers that there would be no more union drivers after July 1 and no more union contract; and that the drivers would have to take out a withdrawal card from the Union if they wanted to continue working. (J.A. 311; 43, 45, 92–93, 199–202.) After the picketing began, drivers Pope and Rozmus were told by supervisory employees that, if they came back to work, they could keep all fares received and the Companies would buy the gas (J.A. 312, 313; 62, 68–69, 211–212).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Companies had reduced their employees' compensation and introduced a different system of payment without first notifying and bargaining with the Union, and that they had terminated the collective bargaining agreements without notifying the federal and state agencies as provided in Section 8(d)(3) of the Act (J.A. 304–306, 308–309, 325). The Board concluded that, by these acts as well as by their overall conduct, the Companies failed to bargain with the Union in good faith, and thus violated Section 8(a)(5) (J.A. 305–306, 308–309, 310, 325). The Board further found that the Companies violated Section 8(a)(3) and (1) by discharging their drivers and conditioning reemployment under a lease arrangement upon their withdrawal from the Union (J.A. 326–327). Finally, the Board found that the Companies violated Section 8(a)(1) by threats and promises of benefits to the drivers in order to induce them to abandon the Union (J.A. 311–315).

The Board's order requires the Companies to cease and desist from the unfair labor practices found; to bargain in good faith with the Union; to resume their taxicab operations as conducted prior to July 1, 1963; to cancel any lease agreements with the drivers, and to reinstate, and continue to operate under, the labor agreements in effect on July 1, 1963, until such time as they may lawfully be terminated pursuant to Section 8(d); to offer reinstatement to the discharged drivers with back pay; and to post notices (J.A. 319–321, 328–329).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals held that the Board's findings were supported by substantial evidence and enforced the Board's order in full (Pet. 11–15).

ARGUMENT

The decision of the court below is correct, and turns on the facts of this particular case. There is no occasion for further review.

1. The Companies do not here attack the findings of the Board, affirmed by the court below, that they terminated the existing labor agreements with the Union without serving notice on the federal and state mediation services as required by Section 8(d)(3) of the Act;[4] and that they entered into lease agreements

[4] In relevant part, Section 8(d) provides that, where there is in effect a collective bargaining contract, "the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

* * * * * * *

(3) notifies the Federal Mediation and Conciliation Serv-

with the drivers which substantially altered terms and conditions of employment without bargaining with the Union. Their sole contention (Pet. 6–8) is that the Board lacked statutory authority to remedy these clear violations of the duty to bargain collectively by requiring the Companies to cancel the leases and resume operations under the old agreements until such time as they may be terminated by either party in accordance with Section 8(d). There is no merit to this contention.

It is settled that the broad grant of remedial authority which Section 10(c)[5] confers upon the Board encompasses remedies that achieve "a restoration of the situation, as nearly as possible, to that which would have obtained but for [the unfair labor practices]." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 194; *National Labor Relations Board* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 348; *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 216. Where, as here, the unfair labor practice consists of the unlawful termination of an existing labor agreement and the unlawful substitution of another arrangement, the *status quo ante* can be most nearly recreated only by requiring, as the Board did, that the new arrangement be

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ice within thirty days after such notice [the 60-day notice of termination or modification specified in subsection (1)] of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred * * *."

[5] Section 10(c) empowers the Board to order "such affirmative action * * * as will effectuate the policies of this Act."

cancelled and that the parties resume operations under the old agreement, at least until such time as it may be terminated in accordance with the statutory procedures.[6] This remedy does not involve the Board in writing a contract for the parties; the remedy accepts the contract written by the parties and merely requires that they continue giving effect to it pending compliance with the statutory requirements for good faith collective bargaining.

Contrary to petitioners' contention (Pet. 6–7), the decision below does not conflict with *National Labor Relations Board* v. *Light Boat Storage, Inc.*, 373 F. 2d 762 (C.A. 5). Although the court there stated that the Board lacked power to order an employer, who had unlawfully repudiated a contract during its term, to give effect to that contract beyond the time when it would ordinarily have expired, the actual holding was much narrower. Noting that the Board's order was ambiguous as to whether it applied beyond the period after which the contract would have expired, the court "interpret[ed] it not to apply to such periods, and as so interpreted, enforce[d] the order" (373 F. 2d at 767). The court expressly stated (p. 767) that it was "limiting our decision to the facts of this case."

Nor are petitioners aided by *Proctor & Gamble Independent Union* v. *Proctor & Gamble Manufac-*

[6] See *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 215–217; *National Labor Relations Board* v. *Central Illinois Public Service Co.*, 324 F. 2d 916, 919 (C.A. 7); *National Labor Relations Board* v. *Gene Hyde*, 339 F. 2d 568 (C.A. 9); *National Labor Relations Board* v. *Warrensburg Board & Paper Corp.*, 340 F. 2d 920, 922–923 (C.A. 2).

turing Co., 312 F. 2d 181 (C.A. 2), certiorari denied, 374 U.S. 830. There the court dismissed a suit under Section 301 of the Labor Management Relations Act to compel grievance arbitration, on the ground that the contract had expired. In so doing, it rejected the union's contention that the contract automatically had been extended because of the union's failure to give the notices required by Section 8(d)(3) of the National Labor Relations Act. However, the court acknowledged that such failure "is an unfair labor practice which the Board may redress by a proper order," and that "remedies for unfair labor practices under Section 8(d) are exclusively the province of the Board" (312 F. 2d at 188–189).

2. There is likewise no substance to petitioners' contention (Pet. 8–9) that the Board has impermissibly extended the area of mandatory bargaining under the Act in requiring the Companies to bargain with the Union over the fare or meter rate of their cabs. Where, as here, the employees' method of compensation is directly geared to the rates charged by the employer,[7] the employees have a sufficient interest in the latter to make it a matter "suitable for resolution within the collective bargaining framework." *Fibreboard Paper Products Corp* v. *National Labor Relations Board*, 379 U.S. 203, 213–214; cf. *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283. It is not the

[7] As shown (*supra*, pp. 4–5), the drivers were paid a percentage of the fares collected. The Companies' proposal to reduce the drivers' percentage from 47.5 to 42.5 percent, and the fare rate from 40 to 30 cents per mile, would reduce the drivers' earnings by 30 percent.

label which an employer puts on his action, such as "change in the price of the goods sold" (Pet. 9), but "the impact of the employer's unilateral decisions on the employee unit involved" (*District 50, United Mine Workers* v. *National Labor Relations Board,* 358 F. 2d 234, 236 (C.A. 4)), which determines whether the action is subject to bargaining under the Act. Cf. *Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 689–690 (opinion of Mr. Justice White).

3. Finally, contrary to petitioners' contention (Pet. 9-10), the question whether the drivers were constructively discharged by the Companies presents only a substantial evidence question, which does not warrant review by this Court. Moreover, the facts summarized in the Statement (*supra,* pp. 4–6) fully support the Board's finding that the Companies gave the drivers' the choice of continuing to work only if they accepted the illegal condition of working under the new lease arrangement and rejecting the Union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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